## CWA Negligence Standard

James Morgan to: Michael Berman

Cc: aaron.farmer, Elder, Julianne Socha, kelly.mccloud, Kristina.Tonn, MRodgers

From:

James Morgan/DC/USEPA/US

To:

Michael Berman/R5/USEPA/US@EPA.

Cc:

aaron.farmer@ohioattorneygeneral.gov, Elder@agri.ohio.gov, Julianne Socha/R5/USEPA/US@EPA, kelly.mccloud@ohioattorneygeneral.gov, Kristina.Tonn@ohioattorneygeneral.gov, MRodgers@agri.ohio.gov

Attached is a short discussion from the USDOJ environmental crimes manual regarding the negligence standard in the CWA. Also, below are the citations to the 3 circuit courts that have addressed the question of the CWA negligence standard. All three have found it is ordinary negligence.

08/07/2012 11:12 AM

United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999)

United States v. Ortiz, 427 F.3d 1278 (10 Cir. 2005)

United States v. Pruett, 681 F.3d 232 (5th Cir. 2012)



CWA Negligence Standard.pdf

J.T. Morgan, Attorney **Environmental Protection Agency** Office of Criminal Enforcement, Forensics and Training Legal Counsel Division Room 1204 C AR, Mail Code 2232A 1200 Pennsylvania Avenue, N.W. Washington, D.C. 20004 Telephone: (202) 564-7684 (202) 501-0579 Fax:

Help EPA fight pollution - report environmental violations at http://www.epa.gov/compliance/complaints/index.html

## 7. Negligence

Two environmental statutes criminalize negligent conduct, the Clean Water Act and the Clean Air Act, 33 U.S.C. § 1319(c)(1) and 42 U.S.C. § 7413(c)(4). The first of those is a misdemeanor parallel to the statute's basic felony provisions in 33 U.S.C. § 1319(c)(2). The second is a rather unique negligent endangerment misdemeanor, which has not yet been construed by any court.

The government's position consistently has been that the mental state standard in the Clean Water Act is one of simple negligence: whether the defendant used reasonable care, that is, the care which a reasonably careful person would use under similar circumstances.

A plain reading of the negligence provision does not indicate anything beyond a simple negligence standard. The statute does not require that the defendant's conduct be "grossly negligent," but only that it be "negligent." 33 U.S.C. § 1319(c)(1). If Congress intended to require a showing of gross negligence, it would have specified that standard as it has in other statutes. See, e.g., 19 U.S.C. § 1592(c)(2) (customs fraud statute provides for gross negligence and negligence, with penalties for negligence less than those for gross negligence); 7 U.S.C. § 87b(c) ("knowingly" defined as "gross negligence" in grain quality statute); 7 U.S.C. § 1596(a) (gross negligence standard applies to violations of Agriculture Department's seed regulations); 42 U.S.C. § 12672 (Good Samaritan Food Act defines gross negligence).

The legislative history of the CWA supports the position that Congress intended to create a simple negligence standard. The only legislative commentary on the negligence standard, dating from the original 1972 enactment, suggests that the Act requires proof of simple negligence and nothing more. In a debate concerning whether to include a provision allowing for criminal penalties for violations of EPA orders, Representative Harsha stated that this would be unnecessary, since, "[W]e can already charge a man for *simple* negligence, we can charge him with a criminal violation under this bill . . . ." A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 at 530 (emphasis added); reported in 118 Cong. Rec.

Until the 1987 amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) contained only misdemeanors with a disjunctive willful or negligent standard. Those amendments split the central criminal provision into a negligent misdemeanor and a knowing felony.

<sup>10, 644 (1972).</sup> Such statements, when undisputed, are a guide in determining legislative intent. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982) (statements by the sponsor of legislation may be understood "as an authoritative guide to the statute's construction.") There is no other legislative history on the negligence standard.<sup>24</sup>